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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 592

ARTHUR RUSSELL HOWELL,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. RAYMOND GORDON,
Counsel for Petitioner.

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To the Honorable Judges of the Supreme Court of the United States:

I

Your petitioner, Arthur Russell Howell, respectfully represents unto your Honors that he has been and is aggrieved by the final judgment of the Court of Appeals for the Fourth Circuit, entered in the above entitled cause of action on the 24th day of January, 1949, and that he believes and alleges that there are grievous and numerous mistakes made in the rulings of the Court of Appeals for the Fourth Circuit therein.

II

The judgment of the said Circuit Court of Appeals is in direct contradiction and violates the principles of law laid down and held by other Circuit Courts of Appeals in the various circuits in the United States.

III

The said judgment is in direct violation of findings of this honorable court on similar points and propositions of law, and the same will disrupt and make unsafe and uncertain the right of persons accused of crime in any court of the United States.

IV

The said judgment of the said Circuit Court of Appeals herein is in direct violation of the Fifth and Sixth Amendments to the Constitution of the United States, and also to the Fourteenth Amendment and to the provisions thereof.

V

The judgment herein is unwarranted and unsupported by facts and circumstances. The Government of the United States offered no evidence, and we contend that the subsequent introduction of evidence by the plaintiff was sufficient to support our contention and to defeat the United States Government in the absence of evidence on the points raised herein, and for these and other facts and circumstances to be added, the petitioner alleges that he is entitled to a writ of certiorari to said judgment to correct the same.

VI

The facts and circumstances involved in this case are set out briefly and clearly in the plaintiff's brief, and are also easily found in the record, but a few of the facts we deem

necessary to call to the court's attention to now, are as follows:

VII

The defendant herein was convicted in the District Court for the Southern District of West Virginia in December of 1940 upon a charge of robbing a national bank, and was sentenced to serve twenty years in the Federal Penitentiary at Atlanta, Georgia. At the time he was tried, he was serving a sentence of ten years for a violation of the Federal Narcotic Act and was returned to West Virginia for trial and given a sentence of twenty years. Immediately thereafter he was recommitted to Leavenworth, Kansas, where he continued to serve the ten years sentence until it was satisfied, then he began serving the twenty years sentence given herein, and served a year and four months of said sentence. Application was made to the District Court of Kansas for the petitioner, and after long and lengthy proceedings, the petitioner alleged that he had been denied compulsory attendance of witnesses; that he had been denied a witness, whose name was Grace Wendell, who had been ordered transferred from Alderson, West Virginia, to Charleston, West Virginia, and he had secured a *duces tecum* and various other documents, including a prescription he had filled in Columbus, Ohio, on the 10th day of November, 1939, on the date of the bank robbery. Judge Melliot denied the writ and refused to discharge the defendant, but after considering the facts, he suggested to the petitioner that a new appeal would be sustained, and the petitioner contended that upon the trial of the case in Charleston, West Virginia, before the District Court, he was sentenced, without counsel, and the District Court of Kansas, on the authority of numerous cases decided by this Court, *Hawks* v. *Olsen,* 312 U. S. S. C. Rep. 119, and *Walker* v. *Johnson,* 312 U. S. Rep. 275, and numerous other

cases, found that the judgment of the District Court for the Southern District of West Virginia was void, and remanded the prisoner back to the District Court for the Southern District of West Virginia for further proceedings. Upon the return of the prisoner to the District Court for the Southern District of West Virginia, the petitioner, by his counsel, made a motion to set aside the verdict of the jury and award him a new trial, because he had been denied compulsory attendance of witnesses; that he had been tried without counsel, and that the United States had known that certain witnesses for the prosecution had identified other men for him, and that there was newly discovered evidence, to-wit: Three prescriptions that had been filled in Columbus, Ohio, for narcotics on the day of the robbery, and these were material and proper for his defense. The Court heard the evidence of the petitioner and refused to grant him a new trial, and sentenced him to serve the balance of the twenty year sentence. The United States Government offered no evidence herein and no denial of the contentions of the plaintiff, or petitioner. Petitioner takes the position that failure to file his answer or deny the motion or any testimony against the facts in the motion was testamentary to and did admit to all the truths alleged therein and set out.

VIII

Upon the trial of the above styled cause of action in the Circuit Court of Appeals for the Fourth Circuit, the Circuit Court did not take the view that the petitioner was too late to make the motion, as the rules now provide that newly discovered evidence must be revealed to the court and motion made to set aside the judgment within three years, but at the time the void judgment was rendered, the rule provided that a motion must be made in the following manner: In other words, the motion to set aside the verdict of the

jury came too late and gave life to a void judgment. The petitioner contended that the judgment rendered on the 3rd day of December, 1940, sentencing him to the penitentiary, having been set aside and held void by the District Court of Kansas, was void for the reason he had no counsel, and the record shows that it was a valid judgment, and it was an erroneous mistake, and this petitioner therefore prays that your Honors will grant unto the petitioner a writ of certiorari to the judgment of the Court of Appeals for the Fourth Circuit entered herein on the 24th day of January, 1948.

ARTHUR RUSSELL HOWELL,
By Counsel.

J. RAYMOND GORDON,
Attorney for Plaintiff.

BRIEF STATEMENT OF FACTS

The facts completely set forth in the plaintiff's brief filed in the Circuit Court of Appeals herein, and also in the petition for a writ of certiorari, counsel for the petitioner is of the opinion that the Court's attention should be called to the regular propositions the petitioner relies upon.

I

The petitioner contended that the judgment rendered in 1940 sentencing him to the penitentiary for twenty years was a void judgment, and that it was void because it violated the Fourteenth Amendments to the Constitution, the Fifth Amendment and the Sixth Amendment, and particularly because the petitioner had counsel for only a part of the trial of this case.

II

The petitioner contended that the after discovered evidence, that is, narcotic prescriptions filled in Columbus, Ohio, that were filled the day of the bank robbery, entitled him to a new trial, and

III

That he had been denied getting witnesses on the trial of the issues herein. The District Court did not feel that the Circuit Court of Appeals' opinion that the void judgment herein against him in 1940 could mark a deadline for the filing of this motion. The District Court never entertained any idea like that. That was an afterthought of Honorable John J. Parker of the Circuit Court of Appeals. The opinion also expresses the idea that we did not sufficiently prove that the defendant was without counsel. Now, in *Walker* v. *Johnson,* a leading case on similar questions, this Court held that when proceedings attacking a judgment in a criminal

case was made by the petitioner either prevailed or failed like in other law suits by the introduction of evidence, and that it was the duty of the United States to offer evidence or be defeated—that we were not placed beyond the impregnable wall of legal conclusion. If that be the rule, then the Circuit Court was in error on the main question in issue. We proved that the defendant, upon trial of the case, had no counsel in the introduction of the testimony, and the most important part of his case, the sentencing of him to the penitentiary, to which his own counsel at that time testified he did not recall whether they were there or not. The District Clerk was alive and well and in Charleston, the party who wrote this judgment. His chief deputy was still in office. The District Attorney was living and in this neighborhood, and we take the position that the Government failed to meet our contention. You will note from the paragraph in the written opinion herein, where a convict cannot be a witness in support of his case, and that makes me think of a solid year of black. How could a man prevail in court and how many times has the court held that he is a competent witness in his own behalf? These are some of the high points in this case. We contend the judgment herein denied the defendant a fair trial, denied him of compulsory attendance of witnesses and he being also tried without counsel, that the whole proceeding was a mere gesture and a shibboleth on the administration of justice. It is hard to say, how the fact that a man has passed three checks in a city two hundred miles away from a city in which a crime has been committed, at different hours in the day, could have been guilty of an offense such as this defendant is charged. This man is struggling for his life under the law, and our Federal Constitution is not based upon convenience for the court and the Government agencies, but is based upon the eternal principles of human life and justice and liberty upon which this

Government was founded and which we hope will always be its foundation.

It is submitted this writ should issue forthwith and that the judgment herein be corrected.

Respectfully submitted,

J. Raymond Gordon,
Counsel for Petitioner.

(1683)

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 592

ARTHUR RUSSELL HOWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 37–41) is reported at 172 F. 2d 213.

JURISDICTION

The judgment of the Court of Appeals was entered January 24, 1949 (R. 42). The petition for a writ of certiorari was filed February 23, 1949.[1] The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

In December 1940, petitioner was convicted of bank robbery in the District Court for the South-

[1] Service was not made until April 4, 1949.

ern District of West Virginia and was sentenced to 20 years' imprisonment. In June 1948, the District Court for the District of Kansas discharged him on habeas corpus on the ground that his trial counsel were not present when the sentence was pronounced and ordered that he be delivered to the trial court for further proceedings. The trial court thereafter denied his motion for a new trial based on the ground that he had been denied process for witnesses at his trial and on allegedly newly discovered evidence, and sentenced him to 20 years' imprisonment, with credit for the time served under the original sentence. The questions are:

1. Whether all the proceedings at the original trial were void because of the adjudication of invalidity of the sentence.

2. Whether the motion for a new trial on the ground of newly discovered evidence was timely and, if so, whether the trial court abused its discretion in denying it.

3. Whether petitioner was entitled to a new trial on the ground that he had been denied compulsory process for witnesses.

STATEMENT

On December 5, 1940, after a jury trial at which he was represented by counsel of his own choice (R. 4, 19, 22–23, 33), petitioner was convicted in the District Court for the Southern District of West Virginia on a charge of bank robbery, and

he was sentenced to imprisonment for 20 years (R. 31). In 1948, he instituted habeas corpus proceedings in the District Court for the District of Kansas attacking the validity of the conviction. On June 24, 1948, the habeas corpus court held that the sentence was void because petitioner's trial counsel were not present when it was pronounced and ordered that petitioner be discharged from custody under the sentence and delivered to the United States Marshal for the Southern District of West Virginia for further proceedings in that court (R. 2, 19–21).

Petitioner was returned to the District Court in West Virginia, where he filed a motion to set aside the verdict and for a new trial on the grounds that he was denied "compulsory attendance for witnesses" and that since his trial new evidence had been discovered which related to and corroborated his alibi (see R. 2, 9). A hearing was held on the motion at which petitioner, who was represented by new counsel, testified that his defense at the trial consisted of an alibi that he was in Columbus, Ohio, on the day that the crime was committed (R. 4), and that one Grace Wendling, who was confined at Alderson Federal Reformatory at the time of the trial, was a witness necessary to his defense and was not produced at the trial despite a court order requiring her attendance (R. 10.)

He also testified that after his trial he had located three narcotic prescriptions, two in his

own name and one in which he used an assumed name, all of which had been filled in Columbus, Ohio, on the date of the robbery (R. 2, 4–9). One of these prescriptions had been filled at a drug store owned by Dudley Horn, who had testified as a defense witness at the trial that it was dated November 13, 1939, the day of the robbery (R. 5, 34–35). However, Horn had not personally filled the prescription and he did not produce it at the trial because the subpoena did not direct him to do so (R. 4–10, 35). At the hearing below, Mrs. Horn, who had filled this prescription, identified a copy of it (R. 13–15), and two other Columbus pharmacists identified prescriptions dated November 13, 1939, which had been filled in their stores. One of these was in petitioner's name, but the pharmacist could not otherwise identify petitioner because he had bought the store after that date (R. 11–13). The third prescription was issued to one James C. Hawkins, a name which petitioner testified he had used (R. 4), but the pharmacist was unable positively to identify petitioner; he could say only that petitioner resembled the man for whom he had filled the prescription (R. 15–17).[2]

One of the attorneys who represented petitioner at his trial in 1940 testified at the hearing and produced a letter he had written to the warden of Alderson reformatory on December 7, 1940, two

[2] At the trial, eye witnesses identified petitioner as one of the robbers (see R. 41).

days after petitioner had been sentenced, in which he explained that he had not required that Grace Wendling be produced at the trial in accordance with the court's prior order to the warden because he had concluded that "her testimony would not be sufficiently valuable to warrant the" expense involved in calling her as at witness (R. 27–29).

The district judge concluded that he was "precluded by the Criminal Rules" (see Rules 29 (b), 33) from entertaining a motion to set aside the verdict and that the only matter for his determination was whether there had been a showing of newly discovered evidence which would be material at a new trial and which if received would probably cause a different result (R. 30). The motion for a new trial was denied, and petitioner was resentenced to a term of 20 years' imprisonment, subject to credit for the time already served on the original sentence (see R. 37). On appeal to the Court of Appeals for the Fourth Circuit, the judgment was affirmed (R. 37–42).

ARGUMENT

1. Petitioner's contention [3] that the absence of his trial counsel at the time sentence was imposed vitiated the trial and verdict is without merit.

[3] The petition for certiorari does not articulate the grounds upon which petitioner seeks review of the judgment below, but we assume his contentions here are the same as he made in the court below (see opinion below, R. 37–38).

The habeas corpus court in Kansas held on the evidence presented to it that the sentence itself was void only because petitioner's counsel were not present when it was pronounced, but that court rejected petitioner's contentions that his constitutional rights were infringed at the trial (see R. 38, 39). The infirmity so found in the proceedings at the time of sentence did not affect the trial and verdict, and the effect is the same as if no judgment had been entered, so that the case remained pending until lawfully disposed of by sentence. *Wilson* v. *Bell,* 137 F. 2d 716 (C. A. 6); *McDonald* v. *Moinet,* 139 F. 2d 939 (C. A. 6), certiorari denied *sub. nom. McDonald* v. *United States,* 322 U. S. 730. This Court has rejected the argument that a prisoner whose guilt is established by a regular verdict may escape punishment altogether because the court committed an error in passing sentence. *In re Bonner,* 151 U. S. 242; *Bozza* v. *United States,* 330 U. S. 160, 166–167. As the court below said (R. 38), petitioner's successful attack upon the judgment of the trial court furnished only a basis for the imposition of a valid sentence and did not invalidate the trial *ab initio. Ruben* v. *Welch,* 159 F. 2d 493 (C. A. 4), certiorari denied, 331 U. S. 814; *De Benque* v. *United States,* 85 F. 2d 202 (C. A. D. C.); *Anderson* v. *Rives,* 85 F. 2d 673 (C. A. D. C.).

2. Petitioner's contention that the district court erred in denying his motion for a new trial on the ground of newly discovered evidence is

equally without merit. In the first place, it was not timely under Rule 33 of the Federal Rules of Criminal Procedure, which provides that such a motion must be made "only before or within two years after final judgment." The resentence in 1948 to cure the infirmity in the sentence imposed in December 1940 did not reinstate the situation existing at that time for all purposes. As the Court of Appeals said (R. 40), it was not the purpose of the rule "to extend the time for making the motion because of a defect in the judgment. A void judgment equally with a valid one would meet the purpose of the rule, which was to fix the time after trial within which the motion should be made; and there would be no sense in permitting the motion after the time so fixed merely because the sentence as entered was technically invalid."

In any event, the district court entertained and overruled the motion on the merits, and its action in that regard is reviewable only for abuse of discretion. It is clear that the court's ruling was proper. The evidence offered as newly discovered was calculated to corroborate petitioner's alibi at the trial that he was in Columbus, Ohio, on the day of the bank robbery and consisted of three narcotics prescriptions which he allegedly had filled at different drug stores in Columbus that day. However, the proprietor of one of the drug stores had testified at the trial that his records showed that such a prescription had been

filled at his store on that date. (See p. 4, *supra*.) Hence, the proferred evidence was merely cumulative.

Moreover, this evidence, like the testimony of the druggist who appeared as a defense witness, could with reasonable diligence have been produced at the trial. And finally, as the court below pointed out (R. 41), the evidence "could not have affected the result in view of the positive identification of appellant by a number of witnesses who saw him engaged in the robbery."

3. Petitioner's final contention is that he was denied the compulsory attendance of Grace Wendling, an inmate of Alderson reformatory, as a witness on his behalf, although he had obtained a writ of habeas corpus *ad testificandum* calling upon the warden to produce her at the trial. The testimony of one of petitioner's trial counsel at the hearing below shows, however, that the failure to call this witness was due to counsel's judgment that her testimony was not "sufficiently valuable" to warrant the expense of bringing her to the place of trial. Thus, the facts show that far from being denied the right of compulsory process for obtaining witnesses, petitioner was in fact granted that right by issuance of the writ of habeas corpus *ad testificandum* and that the witness did not appear solely because his attorney countermanded the order requiring her production.

CONCLUSION

The judgment below is correct and the case presents no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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